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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

SAMUEL LEWIS, DIRECTOR ARIZONA DEPARTMENT OF CORRECTIONS,
GRANT WOODS, ARIZONA Attorney General,

PETITIONERS,

-vs-

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA,

RESPONDENT,

MICHAEL EMERSON CORRELL, JOSE ROBERTO VILLAFUERTE, JIMMY ALAN ARNETT,

REAL PARTIES IN INTEREST.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Ninth Circuit abuse its discretion by refusing to issue a writ of mandamus to supervise the orderly administration of the Arizona District Court, when the evidence clearly demonstrated that the District Court had shown a constant refusal to rule promptly on pending capital habeas corpus cases?

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OPINIONS BELOW

On July 1, 1993, the State of Arizona filed a petition for Writ of Mandamus with the United States Court of Appeals for the Ninth Circuit. (Appendix A.) On July 21, 1993, a three-judge panel of that court summarily denied Arizona's petition without comment and without ordering the respondent court to respond. (Appendix B.)

STATEMENT OF JURISDICTION

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The Arizona Attorney General, on behalf of Petitioners, prays that a Writ of Certiorari issue to review the decision of the Ninth Circuit Court of Appeals in refusing to exercise its supervisorial control of the United States District Court for the District of Arizona. The Ninth Circuit entered its order denying the mandamus petition on July 21, 1993. (Appendix B.) This petition is timely filed within 90 days of that order. Petitioners invoke this Court's Jurisdiction under United States Constitution Article III, Section 2, 28 U.S.C. § 1254(1), 28 U.S.C. § 1651(a), and Supreme Court Rule 10.1.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1651(a).

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

STATEMENT OF THE CASE

On July 1, 1993, Arizona filed a petition for Writ of Mandamus with the United States Court of Appeals for the Ninth Circuit. (Appendix A.) In the petition, Arizona presented five capital habeas corpus cases in which the District Court had refused to promptly rule. The specific procedural history of each case is noted below.[1] The State also attached a chart of all of its pending capital habeas corpus cases. In 56% of the pending cases, the petition was filed in the District Court more than 5 years ago, and of those cases nearly half were filed before 1986. (See Appendix A at A-33-34.)

The State requested that the appellate court exercise its supervisory authority over the District Court and order the lower court to rule on the pending capital cases within specific time periods. (*Id.* at A-26-27.) On July 21, 1993, without ordering the District Court to respond to the petition, a three-judge panel of the Ninth Circuit issued an order denying the mandamus petition without comment on the merits. (Appendix B.) The State timely petitions for certiorari from the action of the Ninth Circuit.

Correll v. Lewis.

Michael Emerson Correll is an inmate in the Arizona State Prison sentenced to be executed. On September 15, 1987, Correll filed a Petition for Writ of Habeas Corpus and an Application for Stay of Execution. On September 18, 1987, the District Court of Arizona issued an order staying

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1. In two of the cases, *Chaney* and *Ceja*, the State challenged the fact that the District Court had not ruled on procedural motions that had been pending for over a year. After the State filed the mandamus petition the District Court ruled on those motions, therefore those cases are not specifically presented in this petition.

the scheduled execution. On October 2, 1987, the District Court appointed two attorneys to represent Correll in the habeas corpus proceeding. Later the court granted Correll's request to amend the petition. On February 24, 1988, Correll filed his first Amended Petition for Writ of Habeas Corpus.

On September 7, 1989, the State filed two separate motions for summary judgment.[2] On November 15, 1989, Correll filed a response to the State's Motions for Summary Judgment, and the State replied on December 4, 1989. On February 10, 1990, Correll filed another motion to amend the petition raising two additional claims. Over the State's opposition, on March 14, 1990, the District Court granted Correll's request to amend. On April 2, 1990, the State filed a summary judgment motion on the newly added claims. The District Court took no action on the State's summary judgment motions.

In 1991, when the District Court learned that the State was preparing a mandamus petition against the court for failing to act on the summary judgment motions, the court ordered a status conference on the petition. On October 4, 1991, more than 4 years after the filing of Correll's petition, the District Court vacated the State's summary judgment motions, and allowed Correll to amend his petition one more time.

On December 6, 1991, Correll filed his Third Amended Petition for Writ of Habeas Corpus. On February 14, 1992, the State again filed a

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2. The delay in the filing of a response to Correll's amended petition was initially due to oversight in the District Court Clerk's Office in that it failed to serve the State with copies of any of the District Court's orders. Also, after the Ninth Circuit issued its opinion in *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988), holding Arizona's death penalty statutes to be unconstitutional, the District Court stayed all proceedings related to Correll's death sentence, but ordered the proceedings related to the remainder of the claims to continue.

Motion for Summary Judgment. On May 15, 1992, Correll filed a response to the State's summary judgment motion, and the State replied on May 29, 1992. In conjunction with his response to the motion for summary judgment, Correll moved to expand the record with material never presented to the state courts. The State objected to the motion, and on June 19, 1992, the District Court heard argument on the respective motions and stated, "The court will enter a formal written order in this matter."

After waiting over 9 months for the Court's written order, the State filed a request for ruling. The State pointed out the extreme length of time —5½ years—that had passed since Correll filed his original petition with the court. The State asked, pursuant to *In re Blodgett*, ___ U.S. ___, 112 S. Ct. 674 (1992), that the court "exercise all due diligence and render its opinion forthwith." The District Court did not respond to the State's request for ruling, nor did it rule on the State's Motion for Summary Judgment, so the mandamus petition was filed.[3]

Villafuerte v. Lewis.

Jose Roberto Villafuerte is an inmate in the Arizona State Prison sentenced to be executed. On May 9, 1991, Villafuerte filed a preliminary Petition for Writ of Habeas Corpus and an Application for Stay of

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3. After the State filed the mandamus petition, the District Court issued an order denying Correll's motion to supplement the record in accordance with *Keeney v. Tamayo-Reyes*, ___ U.S. ___, 112 S. Ct. 1715 (1992). The court also found that 26 of the claims raised by Correll were in procedural default. However, the court ordered that Correll could file additional pleadings to show cause and prejudice for the default. The Court then vacated the submission of the State's summary judgment motion. The State objected to the District Court vacating the submission of its motion.

Execution in the District Court. On May 14, 1991, the District Court issued a stay of the execution and appointed counsel for Villafuerte. On July 19, 1991, Villafuerte filed an amended petition. On August 26, 1991, the State filed a motion for summary judgment on all issues in the amended petition. Villafuerte filed a response and the State filed a reply. On March 16, 1992, the District Court heard oral argument on the motion for summary judgment. As of the date the State filed its mandamus petition, the District Court had not ruled on the motion for summary judgment, although more than 15 months had passed since oral argument on the motion.[4]

Arnett v. Lewis.

The Arizona Supreme Court first affirmed Arnett's conviction and death sentence in *State v. Arnett,* 119 Ariz. 38, 579 P.2d 542 (1978). Arnett was resentenced after this Court's opinion in *Lockett v. Ohio,* 438 U.S. 586 (1978), and that sentence was affirmed in *State v. Arnett*, 125 Ariz. 201, 608 P.2d 778 (1980). Arnett filed his federal habeas corpus petition in 1983. Arnett had failed to exhaust some of the issues he raised, so while his petition was pending he returned to state court. Arnett filed partial summary judgment motions and, in February 1987, the District Court ruled on those motions. The court granted partial relief to Arnett to include another resentencing, and an evidentiary hearing on the

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4. After the State filed its mandamus petition with the Ninth Circuit, the District Court took some action on the *Villafuerte* case. In an order dated July 9, 1993, the court denied Villafuerte's motion to reconsider the court's order finding procedural default on six claims and refusing to hold an evidentiary hearing. As of the date of the filing of this certiorari petition, the District Court had taken no further action on the State's summary judgment motion.

voluntariness of his confession.

On March 6, 1987, the State sought a stay from the District Court because the Arizona Supreme Court had decided to hear Arnett's new state claims on the merits. The District Court granted the stay. In 1988, the Arizona Supreme Court again affirmed the conviction and death sentence in *State v. Arnett*, 158 Ariz. 15, 760 P.2d 1064 (1988). The State asked the District Court to lift the stay and grant a rehearing. Arnett then asked to amend his petition to include the new issues recently decided by the Arizona Supreme Court. The District Court lifted the stay but denied the State's motion for rehearing. The District Court allowed Arnett to amend his petition.

For 2 years, discovery took place in anticipation of the federal evidentiary hearing on the voluntariness issue. The parties filed memoranda on the admissibility of evidence. In April 1992, Arnett filed a fourth motion for partial summary judgment on his amended petition. The State filed its response on May 13, 1992. The District Court has not ruled on Arnett's motion, nor has it set a date for the evidentiary hearing.

REASONS WHY THE WRIT SHOULD ISSUE

BECAUSE THE DISTRICT COURT HAS GRANTED STAYS OF EXECUTION IN THESE CAPITAL CASES, IT HAS A DUTY TO TAKE ALL STEPS NECESSARY TO ENSURE THE PROMPT RESOLUTION OF THE CASE—A DUTY THE DISTRICT COURT OF ARIZONA HAS FAILED TO FULFILL; THEREFORE, THE NINTH CIRCUIT CLEARLY ABUSED ITS DISCRETION BY SUMMARILY DENYING THE STATE'S MANDAMUS PETITION.

A. THE DISTRICT COURT'S FAILURE TO RULE PROMPTLY ON THE ISSUES BEFORE IT IS BEING OFT REPEATED, MANDATING THAT THIS COURT ACCEPT THE PETITION AND SUPERVISE THE ORDERLY ADMINISTRATION OF THE FEDERAL DISTRICT COURT OF ARIZONA.

Under the All Writs Act, 28 U.S.C. § 1651(a), the federal courts of appeals may issue a wit of mandamus when it is "necessary or appropriate in aid of their respective jurisdictions." *Will v. Calvert Fire Insurance Company*, 437 U.S. 655, 661 (1978) (plurality opinion); *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21 (1943). This Court has long recognized this authority, and stated when it should be used.

> Applications for a mandamus to a subordinate court are warranted by the principles and usages of law in cases where the subordinate court, having jurisdiction of a case, refused to hear and decide the controversy, or where such a court, having heard the cause, ***refuses to render judgment or enter a decree in the case.***

Ex Parte Newman, 81 U.S. (14 Wall.) 152, 165 (1872) (emphasis added). Repeated decisions of this Court have established the rule that mandamus "will lie in a proper case to direct a subordinate Federal Court to decide a pending cause." *Insurance Company v. Comstock*, 83 U.S. (16 Wall.) 258, 270 (1873); *Will v. Calvert Fire Ins. Co.*, 437 U.S. at 662; *Thermtron*

Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 352 (1976).

For mandamus to issue, there must be a clear right to the relief sought, a plainly defined and peremptory duty on the part of the respondent to do the action in question, and no other adequate remedy available. The petitioner must also show that the right to the writ is "clear and indisputable." *Mallard v. United States Dist. Court for the S. Dist. of Iowa*, 490 U.S. 296, 109 S. Ct. 1814, 1822 (1989); *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35-36 (1980). Arizona believes that it demonstrated each criterion established by this Court and that it was plain and manifest error for the Ninth Circuit to deny the mandamus petition, thereby warranting relief in this Court. *La Buy v. Howes Leather Company*, 352 U.S. 249, 259-60 (1957) (writs on mandamus may be used for "supervisory control of the District Courts by the Court of Appeals").

1. The District Court has a plainly defined and peremptory duty to act promptly in capital habeas corpus cases—a duty the District Court of Arizona constantly fails to fulfill.

There is general agreement among the Circuit Courts that "[h]abeas corpus is a speedy remedy entitled to preferential consideration." *McClellan v. Young*, 421 F.2d 690, 691 (6th Cir. 1970); *Johnson v. Rogers*, 917 F.2d 1283, 1284 (10th Cir. 1990); *Van Buskirk v. Wilkinson*, 216 F.2d 735, 737-38 (9th Cir. 1954). Recently, this Court stated that it would not tolerate unreasonable delay in a capital habeas corpus case, and held that such delay could be the basis of a mandamus petition:

> In a capital case the grant of a stay of execution directed to a State by a federal court imposes on that court the concomitant duty ***to take all steps necessary to ensure a prompt resolution of the matter***, consistent with its duty to give full and fair consideration to all of the issues presented in the case.

In re Blodgett, __ U.S. __, 112 S. Ct. 674, 676 (1992) (emphasis added).

The District Court of Arizona, by not promptly resolving the matters before it, has failed in the instant cases to follow the dictates of *In re Blodgett*. In *Correll*, the petition for writ of habeas corpus has been pending in the District Court since September 15, 1987. The petition has been under various motions for summary judgment since December 4, 1989. The most recent motion for summary judgment was at issue on June 19, 1992. After the State's mandamus petition was filed in the Ninth Circuit, the District Court allowed Correll to file additional pleadings, and vacated the submission of the motion. (See footnote 3 *supra*.) In *Villafuerte*, the petition for writ of habeas corpus was filed May 9, 1991. That petition was submitted under a motion for summary judgment since March 16, 1992. Arnett filed his petition for writ of habeas corpus in 1983. The District Court has granted Arnett a new sentencing hearing and ordered an evidentiary hearing on one of his issues concerning his conviction. The order granting an evidentiary hearing is more than 2 years old, and the District Court has yet to set a date for the hearing.

The District Court has failed in its "duty ***to take all steps necessary to ensure a prompt resolution of the matter.***" *Blodgett*, 112 S. Ct. at 676 (emphasis added).

2. Mandamus is the only available means to ensure the prompt resolution of the instant cases.

A petition for writ of mandamus to a higher court is the appropriate action when an inferior court refuses to act on a case pending before it.

> There can be no doubt that, where a district court persistently and without reason refuses to adjudicate a case properly before it, the court of appeals may issue the writ [of mandamus] "in order that [it] may exercise the jurisdiction of review given by law."

Will v. Calvert Fire Ins., 437 U.S. at 661-62 (quoting *Insurance Company*

v. Comstock, 83 U.S. (16 Wall.) 258, 270 (1872)); *Ex Parte Newman*, 81 U.S. (14 Wall.) at 165. The State of Arizona has no other available remedy to ensure a prompt resolution of these cases except a mandamus petition.

3. The prejudice suffered by the State through the dilatory actions of the District Court are real and should be addressed through a mandamus petition.

This Court recognized the prejudice suffered by a state when a federal court refuses to act promptly on a habeas corpus petition.

> None of the reasons offered in the response dispels our concern that the State of Washington has sustained ***severe*** prejudice by the ***two-and-a-half*** year stay of execution. The stay has prevented Washington from exercising its sovereign power to enforce the criminal law, an interest we found of great weight in [*McCleskey v. Zant*] when discussing the importance of finality in the context of federal habeas corpus proceedings.

In re Blodgett, 112 S. Ct. at 676 (citation omitted, emphasis added). As with the State of Washington in *Blodgett*, Arizona is suffering a severe diminution of its sovereign power.

> Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but ***the power of a state to pass laws means little if the state cannot enforce them***.

McCleskey v. Zant, __ U.S. __, 111 S. Ct. 1454, 1469 (1991) (emphasis added). The diminution of sovereignty is even greater for the State of Arizona in these cases because the federal courts have prevented the State from enforcing its criminal laws against some of these inmates for considerably longer than the "two-and-a-half" years condemned by the Court in *Blodgett*.

The District Court's apparent endless search for epistemological certainty on the issues before issuing a decision damages the very justice the court seeks.

> A procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude implies a lack of confidence about the possibilities of justice that cannot but war with the underlying substantive commands. . . . There comes a point where a procedural system which leaves matters perpetually open no longer reflects humane concern but merely anxiety and a desire for immobility.

McCleskey v. Zant, 111 S. Ct. at 1469 (quoting Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 452–53 (1963)). A court immobilized in its search for justice provides none. The District Court's duty is not to achieve absolute certainty on an issue before it, but simply, after due consideration, to decide it.

> With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. ***We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.***

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) (emphasis added). Ever-delayed justice is no justice at all.

The State of Arizona has a clear right to a writ of mandamus because the District Court has a plainly defined and peremptory duty to act in a prompt fashion, and the District Court has failed to perform that duty. The State continues to suffer prejudice because of the District Court's failure to act. Therefore, the State's right to the writ is "clear and indisputable." *Mallard*, 109 S. Ct. at 1822. The Ninth Circuit abused its discretion by

not ordering the District Court to respond,[5] and thereafter granting the writ. WRIGHT, MILLER, COOPER & GRESSMON, FEDERAL PRACTICE AND PROCEDURE § 3933 at 214 (1977) (Court of Appeals lacks discretion to deny writ control of patently improper district court actions).

B. THE NINTH CIRCUIT'S FAILURE TO EXERCISE ITS SUPERVISORIAL CONTROL OVER THE DISTRICT COURT PERPETUATES THE PREJUDICE SUFFERED BY THE STATE AND CONDONES THE DISTRICT COURT'S IMPROPER BEHAVIOR.

In *La Buy*, this Court noted that "supervisory control of the District Court by the Courts of Appeals is necessary to proper judicial administration in the federal system." 352 U.S. at 259–60. Even prior to *La Buy*, however, this Court recognized the need to exercise control over the district courts when the courts demonstrated "persistent disregard" of the rules of this Court. *Roche v. Evaporated Milk Ass'n*, 319 U.S. at 31. Legal commentators note that the courts of appeals must exercise control over the district courts to ensure "that its district courts are in fact courts and not schools of solipsism." 9 MOORE'S FEDERAL PRACTICE ¶110.28

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5. The District Court has not officially explained why it is taking so long to process capital habeas corpus cases. Informally, the court has indicated it is doing the best it can with its current case load. Such an excuse, however, is unacceptable, and has been repeatedly rejected as a matter of law. *Johnson v. Rogers*, 917 F.2d at 1285 ("[H]igh volume of prisoner cases pending in the District of Kansas is insufficient to justify the delay."); *McClellan v. Young*, 421 F.2d at 691 (excessive volume of pending habeas petitions insufficient ground to justify delay in deciding them); *see also Jones v. Shell*, 572 F.2d 1278, 1280 (8th Cir. 1978) (busy court docket cannot justify 14-month delay in processing claim from date of remand). If such an excuse were accepted, then the holding of *Blodgett* should be amended to read that the court has a duty to take all steps necessary to ensure a prompt resolution of the matter, *unless it is too busy*. This Court should reject the informal excuse offered by the District Court.

at 341–42 (2d ed. 1993).

In *Will v. United States*, 389 U.S. 90, 107 (1967), this Court criticized the circuit court for failing to explain its decision regarding the mandamus petition. The failure of the court of appeals to explain its action was found critical for two reasons. First, it deprived this Court of any effective information on the question whether the practice of the district courts within the circuit was such as to create a need for "mandamus as a corrective measure." Second, the lack of any opinion meant that the district courts and the parties would not receive any beneficial guidance or instruction concerning what was considered to be proper future conduct. Absent an explanatory opinion, action on a mandamus petition "without rationale is tantamount to an abdication of the . . . expository and supervisory functions of an appellate court." *Will v. United States*, 389 U.S. at 107.

The State demonstrated that the District Court had violated and was continuing to violate the duty recognized by this Court in *Blodgett*. Not only were the five selected cases abysmal in and of themselves, but in looking at the attached chart showing the cases pending in the District Court, it is clear that the District Court of Arizona does not handle capital habeas corpus petitions in an expeditious fashion. (Appendix A at A-33-34.) Besides *Blazak v.* Ricketts, 971 F.2d 1408 (9th Cir. 1992), remanded 1993 U.S. App. LEXIS 19682 (9th Cir. 1993), the District Court has not finally disposed of a first petition in any capital case pending in that court for over 3 years.[6] Yet, the Ninth Circuit without comment

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6. The 3 years is of particular concern because that is how long it has been since this Court upheld Arizona's death penalty statute. *Walton v. Arizona*, 497 U.S. 639 (1990).

simply denied the State's petition. The action of the Ninth Circuit is an "abdication of the . . . expository and supervisory functions" of the court. *Will v. United States*, 389 U.S. at 107.

The rejection of the State's petition sends a clear signal to the District Court that the Ninth Circuit condones the lower court's present practice of taking up to 10 years to decide a capital habeas corpus petition. Without a reasoned opinion, the State is at a loss to know what was lacking in its petition. By denying the petition, was the Ninth Circuit really saying it is reasonable for a district court to wait for over a year to rule on a non-dispositive procedural motion in a capital case? Does the Ninth Circuit really believe that it is acceptable in the federal courts to have dispositive motions for summary judgment pending for literally years? When does the delay become unreasonable, and when should the state seek mandamus review? The action of the Ninth Circuit in not requiring a response and issuing a reasoned opinion is error warranting review by this Court. *Will v. United States*.

C. THIS COURT SHOULD EXERCISE ITS SUPERVISORIAL AUTHORITY AND ESTABLISH A 120-DAY TIME LIMIT FOR RULING ON DISPOSITIVE MOTIONS, A 30-DAY TIME LIMIT FOR RULING ON PROCEDURAL MOTIONS, AND A 180-DAY TIME LIMIT FOR SCHEDULING AN EVIDENTIARY HEARING.

Although the time taken to issue a decision is generally within a court's discretion, a party may obtain a Writ of Mandamus when it shows that the court has abused its discretion. *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 84-85 (1970); *La Buy v. Howes Leather Co.*, 352 U.S. at 257. In *Blodgett*, this Court stated that the federal courts had a duty in capital cases to "***take all steps necessary to ensure a prompt resolution of the matter***." 112 S. Ct. at 676 (emphasis added). Clearly, the District Court of Arizona has failed to follow the *Blodgett* mandate.

That leaves this Court and the State of Arizona with two options. First, the State may petition for writ of mandamus in every current or future capital case pending in the District Court when the court fails to promptly rule on a motion. Such a scenario, however, would require constant inquiries by the appellate court in hundreds of cases, consuming valuable court and attorney time. Second, this Court may order the District Court to rule within specified times on motions in pending capital cases once the motions become at issue. The failure to rule within the time limit would be prima facia evidence that the court has not complied with the *Blodgett* mandate, subjecting the lower court to an order to show cause. This option would establish guidelines to be followed in every case, obviating the need to relitigate the issue in every pending capital case.

The State believes the second alternative is preferable to the first. The *Blodgett* mandate is clear—federal courts must establish procedures and practices to ensure "***prompt***" resolution of habeas corpus petitions in capital cases. The District Court of Arizona has failed to do so. Because the Ninth Circuit has failed to exercise its supervisorial function, this Court must exercise control and establish guidelines that the lower court must obey. Setting time limits for ruling on motions allows the lower court some flexibility, but assures the State that the District Court's current practice of allowing Arizona's capital cases to languish for 10 or more years before ruling will cease.

The State of Arizona believes that once a motion is at issue, it should not take the District Court more than 120 days to rule on a dispositive motion, and 30 days to rule on a procedural motion. The entire state court record is before the court, with record citations and state court opinions. The parties will have briefed the issues, citing the relevant cases. These

time limits provide ample time for the court to rule.

When the District Court determines that an evidentiary hearing is required, the State believes that the hearing should be set within 180 days. One hundred and eighty days is longer than the speedy trial provisions of both the state and federal courts. It is baffling to the State why an evidentiary hearing in a collateral proceeding should require more preparation time than the trial.

The District Court of Arizona has failed to promptly resolve these habeas corpus petitions, and it is incumbent that this Court ensure that its mandate in *In re Blodgett* is satisfied. Establishing these time limits for the District Court to rule on pending capital habeas corpus petitions is not only warranted, but absolutely necessary for the orderly administration of justice.

CONCLUSION

For all of the above-stated reasons, the State of Arizona respectfully requests that the Court grant its certiorari petition and order the respondent court to render its decision on the dispositive motions within 120 days. The State further requests that the District Court be ordered to hold the evidentiary hearing in *Arnett* within 180 days. Furthermore, the State prays that the Court exercise its supervisorial authority and order that the District Court rule on all future capital cases within the time limits established, or its failure will be deemed to be prima facie evidence that an order to show cause is warranted.

Respectfully submitted,
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APPENDICES

APPENDIX A

[Dated July 1, 1993]

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. _____

SAMUEL L. LEWIS, DIRECTOR ARIZONA DEPARTMENT OF CORRECTIONS; GRANT WOODS, ARIZONA ATTORNEY GENERAL,
PETITIONERS,

-vs-

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA,
RESPONDENT,

MICHAEL EMERSON CORRELL, JOSE ROBERTO VILLAFUERTE, ANTHONY LEE CHANEY, JIMMY ALAN ARNETT, JOSE JESUS CEJA,
REAL PARTIES IN INTEREST.

ON PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, NOS. CIV-87-1471-PHX-SMM, CIV-91-0729-PHX-SMM, CIV-85-2266PHX-RCB, CIV-83-2157-PHX-SMM, CIV-84-2322-PHX-RCB

PETITION FOR WRIT OF MANDAMUS

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STATEMENT OF THE FACTS

***Correll v. Lewis*, No. CIV-87-1471-PHX-SMM.**

Michael Emerson Correll is an inmate in the Arizona State Prison sentenced to be executed. On September 15, 1987, Correll filed a Petition for Writ of Habeas Corpus and an Application for Stay of Execution. (Exhibits A and B.) On September 18, 1987, the District Court of Arizona issued an order staying the scheduled execution of Correll. (Exhibit C.) On October 2, 1987, the District Court appointed two attorneys to represent Correll in the habeas corpus proceeding. (Exhibit D.) Later the court granted Correll's request to amend the petition. (Exhibit E.) On February 24, 1988, Correll filed an Amended Petition for Writ of Habeas Corpus. (Exhibit F.)

On April 10, 1989,[1] the State filed a motion to dismiss the amended petition because Correll had not exhausted state court remedies. (Exhibit H.) On June 5, 1989, the District Court denied the State's motion to dismiss, and ordered a response to the petition. (Exhibit I.) After this Court issued its opinion in *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988), the District Court stayed all

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1. The delay in the filing of a response to Correll's amended petition was due to oversight in the District Court Clerk's Office in that it failed to serve the State with copies of any of the District Court's orders. (Exhibit G.)

proceedings related to Correll's death sentence, but ordered the proceedings related to the remainder of the claims to continue. (Exhibit J.)

On September 7, 1989, the State filed two separate motions for summary judgment. (Exhibit K.) On November 15, 1989, Correll filed a response to the State's Motions for Summary Judgment, and the State replied on December 4, 1989. On February 10, 1990, Correll filed another motion to amend the petition raising two additional claims. (Exhibit L.) The State opposed Correll's request. (Exhibit M.) On March 14, 1990, the District Court granted Correll's request to amend the petition. (Exhibit N.) On April 2, 1990, the State filed a summary judgment motion on the newly added claims. (Exhibit O.) The District Court took no action on the State's motions.

In 1991, when the District Court learned that the State was preparing a mandamus petition against the court for failing to act on the summary judgment motions, the court ordered a status conference on the petition. (Exhibit P.) On October 4, 1991, the District Court vacated the State's summary judgment motions, and allowed Correll to amend his petition one more time. (Exhibit Q.)

On December 6, 1991, Correll filed his Third Amended Petition for Writ of Habeas Corpus. (Exhibit R.) On February 14, 1992,

the State again filed a Motion for Summary Judgment. (Exhibit S.) On May 15, 1992, Correll filed a response to the State's summary judgment motion, and the State replied on May 29, 1992. In conjunction with his response to the motion for summary judgment, Correll moved to expand the record with material never presented to the state courts. (Exhibit T.) The State objected to the motion. (Exhibit U.) On June 19, 1992, the District Court heard argument on the respective motions and stated, "The court will enter a formal written order in this matter." (Exhibit V.)

After waiting over 9 months for the Court's written order, the State filed a request for ruling. (Exhibit W.) The State pointed out the extreme length of time that had passed since Correll filed his original petition with the court. (Exhibit W at 2.) The State asked, pursuant to *In re Blodgett*, __ U.S. __, 112 S. Ct. 674, 116 L. Ed. 2d 669 (1992), that the court "exercise all due diligence and render its opinion forthwith." The District Court has not responded to the State's request for ruling, nor has it ruled on the State's Motion for Summary Judgment.

***Villafuerte v. Lewis*, No. CIV-91-0729-PHX-SMM.**

Jose Roberto Villafuerte is an inmate in the Arizona State Prison sentenced to be executed. On May 9, 1991, Villafuerte filed a preliminary Petition for Writ of Habeas Corpus and an Application

for Stay of Execution in the District Court. (Exhibit A.) On May 14, 1991, the District Court issued a stay of the execution and appointed counsel for Villafuerte. (Exhibit B.) On July 19, 1991, Villafuerte filed an amended petition. (Exhibit C.) On August 26, 1991, Respondents filed a motion for summary judgment on all issues in the amended petition. (Exhibit D.) Villafuerte filed a response and Respondents filed a reply. On March 16, 1992, the District Court heard oral argument on the motion for summary judgment. As of this date, the District Court has not ruled on Respondents' motion for summary judgment although more than 15 months have passed since oral argument on the motion.

***Chaney v. Lewis*, No. CIV-85-2266-PHX-RCB.**

The Arizona Supreme Court affirmed Chaney's conviction and death sentence in *State v. Chaney*, 141 Ariz. 295, 686 P.2d 1265 (1984). Chaney filed a federal habeas corpus petition on October 8, 1985. (Exhibits A and B.) The District Court denied the petition, and Chaney appealed. This Court remanded the case on November 28, 1986. *Chaney v. Lewis*, 801 F.2d 1191 (9th Cir. 1986), *cert. denied*, 481 U.S. 1023 (1987). After remand, the State requested that the District Court set a briefing schedule. (Exhibit C.) The District Court granted the State's request, and the State filed its Answer on July 17, 1987. (Exhibits D and E.) The District Court

stayed the proceedings on January 13, 1989, pending a mandate in *Adamson v. Ricketts*. (Exhibit A.) After the United States Supreme Court issued *Walton v. Arizona,*[2] the State requested a ruling on the merits on March 7, 1991. (Exhibit A.) In October 1991, the State requested that the District Court lift its stay. (*Id.*)

Chaney then changed counsel. (Exhibit A.) The District Court ordered Chaney's new counsel to file an amended petition by February 14, 1992. (Exhibit F.) In April 1992, the District Court advised Chaney's counsel that further continuances for the amended petition would not be granted. (Exhibit H.) Chaney then requested that his federal petition be held in abeyance so that he could return to the state court to pursue yet another petition for post-conviction relief. (Exhibit H.) The State opposed Chaney's request. (Exhibit I.)

Chaney finally filed has amended petition on September 4, 1992. (Exhibit J.) The State responded on November 3, 1992. (Exhibit K.) In December 1992, the District Court acknowledged that briefing was complete and the motion to hold in abeyance would be ruled upon as quickly as possible. (Exhibit L.) In March 1993, the State again asked for a ruling on the merits. (Exhibit M.) The District Court has not responded to the State's request, nor ruled on

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2. *497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990).*

the merits of the petition.

***Arnett v. Lewis*, No. CIV-83-2157-PHX-SMM.**

The Arizona Supreme Court first affirmed Arnett's conviction and death sentence in *State v. Arnett,* 119 Ariz. 38, 579 P.2d 542 (1978). Following the attack on the constitutionality of Arizona's death penalty statute, Arnett was resentenced and that sentence was affirmed in *State v. Arnett*, 125 Ariz. 210, 608 P.2d 778 (1980). Arnett filed his federal petition in 1983. (Exhibit B.) Arnett had failed to exhaust some of the issues he raised so while his petition was pending he returned to state court. (Exhibit C.) Arnett filed partial summary judgment motions and in February 1987, the District Court ruled on those motions. The court granted partial relief to Arnett to include another resentencing, and an evidentiary hearing on the voluntariness of his confession. (Exhibit D.)

On March 6, 1987, the State sought a stay from the District Court because the Arizona Supreme Court had decided to hear Arnett's new state claims on the merits. (Exhibit E.) The District Court granted the stay. (Exhibit A.) In 1988, the Arizona Supreme Court again affirmed the conviction and death sentence in *State v. Arnett*, 158 Ariz. 15, 760 P.2d 1064 (1988). The State asked the District Court to lift the stay and grant a rehearing. (Exhibit F.) Arnett then asked to amend his petition to include the new issues recently

decided by the Arizona Supreme Court. (Exhibit G.) The District Court lifted the stay but denied the State's motion for rehearing. The District Court allowed Arnett to amend his petition. (Exhibit H.)

For 2 years, discovery took place in anticipation of the federal evidentiary hearing on the voluntariness issue. (Exhibit A.) The parties filed memorandums on the admissibility of evidence. (Exhibits I, J, and K.) In April 1992, Arnett filed a fourth motion for partial summary judgment on his amended petition. (Exhibit L.) The State filed its response on May 13, 1992. (Exhibit M.) The District Court has not ruled on Arnett's motion, nor has it set a date for the evidentiary hearing.

Ceja v. Lewis, No. CIV-84-2322-PHX-RCB.

Jose Jesus Ceja is an inmate in the Arizona State Prison sentenced to be executed. On December 14, 1984, Ceja filed a Preliminary Petition for Writ of Habeas Corpus and an Application for Stay of Execution. (Exhibits A and B.) On December 14, 1984, the District Court of Arizona issued an order staying the scheduled execution of Ceja. (Exhibit C.) On February 28, 1985, Ceja moved to stay the federal proceedings pending the resolution of state post-conviction relief proceedings pending in state court. (Exhibit D.) The State opposed the motion to stay the proceedings. (Exhibit E.)

On March 28, 1985, the District Court granted Ceja's motion to stay the federal proceedings pending the disposition of proceedings in state court. (Exhibit F.)

On November 19, 1986, Ceja filed an Amended Petition for Writ of Habeas Corpus. (Exhibit G.) On May 6, 1987, the State moved to dismiss Ceja's petition for habeas corpus relief. (Exhibit H.) On June 24, 1987, Ceja moved to strike the State's motion to dismiss. (Exhibit I.) On July 6, 1987, the State replied to Ceja's motion to strike. (Exhibit J.) On October 9, 1987, the District Court denied Ceja's motion to strike, and ordered that Ceja file a response to the State's pending motion to dismiss within 10 days of the Court's order. (Exhibit K.) On November 30, 1987, Ceja filed a response to the State's motion to dismiss. (Exhibit L.) On February 5, 1988, the State replied. (Exhibit M.) On October 18, 1988, the District Court: (1) granted the State's motion to dismiss; (2) directed that the stay of execution would be vacated unless Ceja filed an amended petition for writ of habeas corpus deleting those claims which the District Court determined were unexhausted; (3) ordered that if Ceja elected to amend his petition by deleting his unexhausted claims, Ceja must at the time of filing his amended petition file a statement showing cause and prejudice regarding the 20 claims which were held to be procedurally barred by the Arizona state courts. (Exhibit

N.) On November 1, 1988, Ceja filed a motion to amend and stay the District Court's order of October 18, 1988, and a motion to reconsider and vacate the October 18, 1988 order. (Exhibits O and P.) On November 3, 1988, the District Court granted Ceja's motion to stay the enforcement of the October 18, 1988 order. (Exhibit Q.) On November 16, 1988, the State opposed Ceja's motion to reconsider and vacate the October 18, 1988 order. (Exhibit R.)

On December 5, 1988, the District Court held oral argument on Ceja's motion to reconsider and vacate the memorandum and order. The District Court took the matter under advisement. On May 1, 1989, Ceja filed a motion for partial summary judgment. (Exhibit S.) On May 24, 1989, the State moved to strike Ceja's motion for partial summary judgment. (Exhibit T.)

On July 22, 1989, the District Court ruled on Ceja's motion for reconsideration of the court's October 18, 1988 memorandum and order. The court ruled as follows: (1) denied Ceja's motion for reconsideration concerning issue 3—destruction of "gruesome photographs" and issue 4 concerning the jury instruction on malice; (2) granted Ceja's motion for reconsideration concerning issue 8—single form of the verdict and issue 12—Dr. Karnitschnig's affidavit —by holding that the District Court could hear those claims on the merits; (3) stayed any further action in the matter pending receipt of

the mandate from this Court in *Adamson v. Ricketts*; and (4) ordered that the action would not be dismissed and that the stay of execution would stay in effect until further order of the court. (Exhibit U.)

On November 4, 1991, after the United States Supreme Court decided *Walton v. Arizona,* and *Lewis v. Jeffers,* 497 U.S. 764, 110 S. Ct. 3092, 111 L. Ed. 2d 606 (1990), the State moved to vacate the District Court's stay of July 22, 1989. (Exhibit V.) On December 18, 1991, the State filed a motion to reconsider the District Court's order of July 22, 1989. (Exhibit W.)

On January 27, 1992, Ceja filed a response to the State's motion for reconsideration. (Exhibit X.) On February 18, 1992, the District Court held oral argument on the State's motion to reconsider. The court indicated that it would rule shortly on the motion, and ordered Ceja to make his final *McCleskey* determination. (Exhibit Y.) On April 30, 1992, Ceja notified the District Court that he was unaware of any other claims. (Exhibit Z.)

On March 12, 1993, the State requested the District Court to rule on its motion for reconsideration. (Exhibit AA.) The District Court has not ruled on the State's request for ruling, or the motion for reconsideration.

ISSUE PRESENTED

Is District Court of Arizona taking "all steps necessary to ensure

a "***prompt resolution***" of the capital habeas corpus cases pending before it?

RELIEF REQUESTED

Due to the inexcusable neglect that the District Court of Arizona has exhibited toward Arizona's capital cases, the State requests that this Court establish time periods within which the District Court must rule upon a capital habeas corpus petition, and order the District Court to rule on the present cases within those guidelines or show cause why those judges should not be held in contempt.

REASONS WHY THE WRIT SHOULD ISSUE

BECAUSE THE DISTRICT COURT HAS GRANTED STAYS OF EXECUTION IN THESE CAPITAL CASES, IT HAS A DUTY TO TAKE ALL STEPS NECESSARY TO ENSURE THE PROMPT RESOLUTION OF THE CASE; A DUTY THE DISTRICT COURT OF ARIZONA HAS FAILED TO FULFILL.

Under the All Writs Act, 28 U.S.C. § 1651(a), the federal courts of appeals may issue a wit of mandamus when it is "necessary or appropriate in aid of their respective jurisdictions." *Will v. Calvert Fire Insurance Company*, 437 U.S. 655, 661, 98 S. Ct. 2552, 57 L. Ed. 2d 504 (1978); *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 63 S. Ct. 938, 87 L. Ed. 1185 (1943). The United States Supreme Court has long recognized this authority, and stated when it should be used.

> Applications for a mandamus to a subordinate court are warranted by the principles and usages of law in cases where the subordinate court, having jurisdiction of a case, refused to hear and decide the controversy, or where such a court, having heard the cause, refuses to render judgment or enter a decree in the case.

Ex Parte Newman, 81 U.S. (14 Wall.) 152, 165 (1872). Although the time taken to issue a decision is generally within a court's discretion, a party may obtain a Writ of Mandamus when it shows that the court has abused its discretion. *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 84-85, 90 S. Ct. 1648, 26 L. Ed.

2d 100 (1970); *La Buy v. Howes Leather Co.*, 352 U.S. 249, 257, 77 S. Ct. 309, 1 L. Ed. 2d 290 (1957).

The United States Supreme Court stated that it would not tolerate unreasonable delay in a capital case, and such delay could be the basis of a mandamus petition:

> In a capital case the grant of a stay of execution directed to a State by a federal court imposes on that court the concomitant duty ***to take all steps necessary to ensure a prompt resolution of the matter***, consistent with its duty to give full and fair consideration to all of the issues presented in the case.

In re Blodgett, __ U.S. __, 112 S. Ct. 674, 676, 116 L. Ed. 2d 669 (1992) (emphasis added). The State of Arizona maintains that the District Court of Arizona has abused its discretion in the instant cases by not following the dictates of *In re Blodgett* and promptly resolving the matters before it.

In *In re Cement Antitrust Litigation (MDL NO. 296)*, 688 F.2d 1297 (9th Cir. 1982), this Court explained in detail the guidelines it would use to determine whether a mandamus petition was an appropriate remedy in a particular case. The guidelines described are: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to attain the relief they desire; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the District Court's actions are clearly erroneous as a matter of law; (4) whether the claimed

error is oft repeated error or "manifests persistent disregard for the federal rules"; and (5) whether the petition raises new and important issues of law of first impression. 688 F.2d at 1301 (citing *Bauman v. United States District Court*, 557 F.2d 650, 654–55 (9th Cir. 1977)). This Court refers to these five guides as the *Bauman* factors. *Id.* In *In re Cement Antitrust*, this Court noted that related considerations included whether the injury alleged by the petition was not correctable on appeal; whether the petition presents an issue that would repeatedly evade appellate review; or whether "there are other compelling factors relating to the efficient and orderly administration of the district courts." 688 F.2d at 1301. The State believes that, upon review of the *Bauman* guidelines and the related considerations noted in *In re Cement Antitrust*, all indications show that this Court should accept the instant petition and grant the relief requested by the State of Arizona.

A. MANDAMUS IS THE ONLY AVAILABLE MEANS TO ENSURE THE PROMPT RESOLUTION OF THE INSTANT CASES.

The first two *Bauman* guidelines are designed to insure that mandamus is the appropriate remedy. *In re Cement Antitrust*, 688 F.2d at 1301. A petition for writ of mandamus to a higher court is the appropriate action when an inferior court refuses to act on a case pending before it.

> There can be no doubt that, where a district court persistently and without reason refuses to adjudicate a case properly before it, the court of appeals may issue the writ [of mandamus] "in order that [it] may exercise the jurisdiction of review given by law."

Will v. Calvert Fire Ins., 437 U.S. at 661-62 (quoting *Insurance Company v. Comstock*, 83 U.S. (16 Wall.) 258, 270 (1872)); *Ex Parte Newman*, 81 U.S. (14 Wall.) at 165. The State of Arizona has no other available remedy to ensure a prompt resolution of these cases except a mandamus petition.

Regarding the prejudice facing the State, the United States Supreme Court recognized the prejudice suffered by a state when a federal court refuses to act promptly on a habeas corpus petition.

> None of the reasons offered in the response dispels our concern that the State of Washington has sustained ***severe*** prejudice by the ***two-and-a-half*** year stay of execution. The stay has prevented Washington from exercising its sovereign power to enforce the criminal law, an interest we found of great weight in [*McCleskey v. Zant*] when discussing the importance of finality in the context of federal habeas corpus proceedings.

In Re Blodgett, 112 S. Ct. at 676, 116 L. Ed. 2d at 674 (citation omitted, emphasis added). As with the State of Washington in *Blodgett*, Arizona is suffering a severe diminution of its sovereign power:

> Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but ***the power***

> ***of a state to pass laws means little if the state cannot enforce them.***

McCleskey v. Zant, __ U.S. __, 111 S. Ct. 1454, 1469, 113 L. Ed. 2d 517, 543 (1991) (emphasis added). The diminution of sovereignty is even greater for the State of Arizona in these cases because the federal courts have prevented the State from enforcing its criminal laws against each of the inmates for considerably longer than the "two-and-a-half" years condemned by the Court in *Blodgett*.

The District Court's apparent endless search for epistemological certainty on the issues before issuing a decision damages the very justice the court seeks:

> A procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude implies a lack of confidence about the possibilities of justice that cannot but war with the underlying substantive commands. . . . There comes a point where a procedural system which leaves matters perpetually open no longer reflects humane concern but merely anxiety and a desire for immobility.

McCleskey v. Zant, 111 S Ct. at 1469, 113 L. Ed. 2d at 543 (quoting Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 452-53 (1963)). A court immobilized in its search for justice provides none. The District Court's duty is not to achieve absolute certainty on an issue before it, but simply, after due consideration, to decide it:

With whatever doubts, with whatever difficulties, a case may

> be attended, we must decide it, if it be brought before us. ***We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.***

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) (emphasis added). Ever-delayed justice is no justice at all.

The State of Arizona has clearly shown that under the first two *Bauman* factors the delay caused by the District Court's failure to rule can only be addressed in a mandamus petition and the State is prejudiced by the District Court's inaction. *In re Cement Antitrust*, 688 F.2d at 1301–02.

B. THE DISTRICT COURT'S FAILURE TO RULE PROMPTLY ON THE ISSUES BEFORE IT IS BEING OFT REPEATED, MANDATING THAT THIS COURT ACCEPT THE PETITION AND SUPERVISE THE ORDERLY ADMINISTRATION OF THE FEDERAL DISTRICT COURT OF ARIZONA.

The fourth and fifth factors noted in *Bauman* relate to whether the District Court is engaging in oft repeated error, or manifests a persistent disregard of its duty under law.[3] *In re Cement Antitrust*, 688 F.2d at 1303–04. The fourth and fifth factors also deal with whether the District Court's action presents new and important

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3. The State has not discussed the third factor separately because the State is not seeking redress from a District Court order, but from the court's failure to rule. Therefore, the third factor is not directly relevant to the Court's inquiry because the failure or refusal to rule on a case properly before the court is without question the proper subject of a mandamus petition. Ex Parte Newman.

problems, or issues of first impression. *Id.* These factors also weigh in favor of the State in this Court's consideration of whether to accept the State's petition and grant the relief requested.

The attached chart shows the pervasiveness of the problem the State seeks to redress. Not only are the five selected cases abysmal in and of themselves, but in looking at the attached cases pending in the District Court, it is clear that the District Court of Arizona does not handle capital habeas corpus petitions in an expeditious fashion. Besides *Blazak v. Lewis*, 971 F.2d 1408 (9th Cir. 1992), the District Court has not finally disposed of a first petition in any capital case pending in that court for over 3 years.[4] Such a problem deserves drastic action by this Court.

In deciding whether to issue the supervisory mandamus petition, the Court is faced with an issue of first impression. Not only does the State seek an order from this Court directing the District Court to rule within a time certain on the six cases directly challenged in this mandamus petition; the State also requests that this Court, in its supervisorial authority, establish time periods within which the District Court must rule in capital habeas corpus petitions and direct

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4. The 3 years is of particular concern because it has been over 3 years since the United States Supreme Court upheld the Arizona Death Penalty statute in Walton v. Arizona.

the lower court to rule on all motions in all pending capital cases within those time limits. This request is a case of first impression, and is necessary to the orderly administration of justice.

As noted above, generally it is within a court's discretion when to issue an opinion. However, in *Blodgett*, the United States Supreme Court stated that the federal courts had a "duty" in capital cases to "***take all steps necessary to ensure a prompt resolution of the matter.***" 112 S. Ct. at 676, 116 L. Ed. 2d at 676 (emphasis added). Clearly the District Court of Arizona has failed to follow the *Blodgett* mandate. That leaves this Court and the State of Arizona with two options: First, the State may petition, in every capital case pending in the District Court, or those cases to be filed in the future with the District Court, for a mandamus petition every time the District Court fails to rule promptly on a motion. Such a ruling would require constant inquiries by this Court in hundreds of cases. Such a procedure would consume valuable court and attorney time.

The second option is for this Court to order that, in all capital cases pending before the District Court, that court has to rule within specified times on motions once they come at issue. The failure to rule within the time limit would be a prima facia case that the court has not complied with the *Blodgett* mandate, subjecting the lower

court to an order to show cause. This option would establish guidelines to be followed in every case, obviating the need to relitigate the issue in every pending capital case.

The State believes the second alternative is clearly preferable to the first. The *Blodgett* mandate is clear, federal courts must establish procedures and practices to ensure "***prompt***" resolution of habeas corpus petitions in capital cases. The District Court of Arizona has failed to do so. This Court must exercise control and establish guidelines that the lower court must obey. Setting time limits for ruling on motions allows the lower court some flexibility, but assures the State that the District Court's current practice of allowing Arizona's capital cases to languish in the District Court for 10 or more years before ruling will cease.

C. THE STATE REQUESTS THAT THIS COURT EXERCISE ITS SUPERVISORIAL AUTHORITY AND ESTABLISH A 120-DAY TIME LIMIT FOR RULING ON DISPOSITIVE MOTIONS, A 30-DAY TIME LIMIT FOR RULING ON PROCEDURAL MOTIONS, AND A 180-DAY TIME LIMIT FOR SCHEDULING AN EVIDENTIARY HEARING.

The State of Arizona believes that it should not take the District Court more than 120 days after a dispositive motion is at issue to rule. Likewise, it should not take the District Court more than 30 days after a procedural motion is at issue to rule on the merits of the motion. The entire state court record is before the court, with record

citations and state court opinions. The parties will have briefed the issues citing the relevant cases. These time limits are ample time for the court to rule.

When the District Court determines that an evidentiary hearing is required, the State believes that the hearing should be set within 180 days. One hundred and eighty days is more than the speedy trial provisions of both the state and federal courts. It is baffling to the State why an evidentiary hearing in a collateral proceeding should require more preparation time than the trial.

The District Court of Arizona has failed to promptly resolve these habeas corpus petitions, and it is incumbent that this Court ensure that the mandate in *In re Blodgett* is satisfied. The State believes that establishing these time limits for the District Court to rule on pending capital habeas corpus petitions is not only warranted, but absolutely necessary for the orderly administration of justice.

CONCLUSION

For all of the above stated reasons, the State of Arizona respectfully requests that the Court grant the writ and order the respondent court to render its decision on the dispositive motions within 120 days, or rule on the procedural motions within 30 days. The State further requests that the District Court be ordered to hold the evidentiary hearing in *Arnett* within 180 days. Furthermore, the State prays that the Court exercise its supervisorial authority and order that the District Court shall rule on all future capital cases within the time limits established, or it will be deemed to be prima facie evidence that an order to show cause is warranted.

Respectfully submitted,

GRANT WOODS
ATTORNEY GENERAL

/S/

PAUL J. McMURDIE
CHIEF COUNSEL
CRIMINAL APPEALS SECTION

Attorneys for PETITIONERS

CERTIFICATE OF SERVICE

TWO COPIES of this Petition were deposited for mailing this 1st day of July, 1993, to:

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Phoenix, Arizona 85025

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CR871160.man

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. _____

SAMUEL L. LEWIS, DIRECTOR ARIZONA DEPARTMENT OF CORRECTIONS, et al.,

PETITIONERS,

-vs-

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA,

RESPONDENT,

MICHAEL EMERSON CORRELL, et al.,

Real parties in interest.

ON PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, NOS. CIV-87-1471-PHX-SMM CIV-91-0729-PHX-SMM, CIV-85-2266-PHX-RCB, CIV-83-2157-PHX-SMM, CIV-84-2322-PHX-RCB

STATEMENT OF RELATED CASES

Pursuant to Rule 28-2.6 of the Rules of the United States Court of Appeals for the Ninth Circuit, Respondents state that they are unaware of any related cases other than those contained in the chart

attached.

DATED this 1st day of July, 1993.

GRANT WOODS
Attorney General

/S/

PAUL J. McMURDIE
CHIEF COUNSEL
CRIMINAL APPEALS
SECTION

Attorneys for
PETITIONERS

CASES PENDING IN FEDERAL DISTRICT COURT AS OF JULY 1, 1993

NAME	CASE NUMBER	PETITION FILED
Arnett	CIV-83-2157-PHX-SMM	10/24/83
Bishop	CIV-83-2162-PHX-EHC	11/4/83
Ortiz	CIV-84-0955-TUC-WDB	12/7/84
Woratzeck	CIV-84-1783-PHX-CAM	9/24/84
Ceja	CIV-84-2322-PHX-RCB	12/14/84
Libberton	CIV-85-0249-PHX-EHC	1/31/85
Gretzler	CIV-85-0537-TUC-RMB	6/10/85
Gerlaugh	CIV-85-1647-PHX-RGS	7/12/85
Chaney	CIV-85-2266-PHX-RCB	10/8/85
Martinez-Villarreal	CIV-86-0296-TUC-RMB	6/9/86
Zaragoza	CIV-86-0714-PHX-EHC	5/8/86
Smith, R.D.	CIV-87-0234-TUC-RMB	4/14/87
Lambright	CIV-87-0235-TUC-RMB	4/14/87
Smith, B.	CIV-87-0634-PHX-RCB	4/22/87
Nash	CIV-87-0716-PHX-EHC	5/6/87
Correll	CIV-87-1471-PHX-SMM	9/18/87
McMurtrey	CIV-88-0844-TUC-RMB	12/12/88
McCall	CIV-90-1440-PHX-CAM	10/02/90
Poland, M.	CIV-90-1822-PHX-SPK	11/20/90

Poland, P.	CIV-90-1823-PHX-RJK	11/20/90
Wallace	CIV-91-0315-TUC-WDB	6/5/91
Clabourne	CIV-91-0465-TUC-RMB	8/28/91
Amaya-Ruiz	CIV-91-0606-TUC-WDB	10/16/91
Villafuerte	CIV-91-0729-PHX-SMM	5/9/91
LaGrand, W.	CIV-92-0026-TUC-JMR	1/13/92
LaGrand, K.	CIV-92-0089-TUC-JMR	1/16/92
Vickers	CIV-92-0913-PHX-PGR	5/14/92
Moorman	CIV-92-1121-PHX-EHC	1/28/92
Beaty	CIV-92-2076-PHX-RGS	11/4/92
James	CIV-93-0869-PHX-RGS	5/4/93

[Filed July 21, 1993]

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SAMUEL L. LEWIS, Director, Arizona Department of Corrections;
GRANT WOODS, Attorney General,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA;
Respondent,

MICHAEL EMERSON CORRELL;
JOSE ROBERTO VILLAFUERTE;
ANTHONY LEE CHANEY;
JIMMY ALAN ARNETT;
JOSE JESUS CEJA,
Real Parties in Interest.

No. 93-70578

D.C. No.
CV-91-0729-PHX-SM
CV-87-1471-PHX-SM
CV-85-2266-PHX-RC
CV-84-2322-PHX-RC
CV-83-2157-PHX-SM
ARIZONA (PHOENIX)

ORDER

Before: BROWNING, TANG, and NORRIS, Circuit Judges.

The petition for writ of mandamus is denied.